

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH EDMUND MAIN,

Defendant-Appellant.

UNPUBLISHED

April 27, 2004

No. 246343

Eaton Circuit Court

LC No. 02-020227-FH

Before: Bandstra, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of criminal sexual conduct in the second degree. MCL 750.520c(1)(a) (victim under thirteen years of age). He was sentenced as a habitual offender to concurrent terms of 10 to 22½ years in prison. He now appeals, and we affirm his conviction but remand for resentencing.

The victim testified that defendant, her older sister's boyfriend, engaged in sexual contact (primarily rubbing her breasts) on several occasions in January and February of 2002. The offenses were reported to the authorities in May of 2002 when the victim informed school personnel of the events. Although the victim described several separate episodes, defendant was only tried on three counts of second-degree criminal sexual conduct. The jury convicted on two of the counts and acquitted defendant on the third count. The victim was twelve years old at the time of the offenses.

Defendant first argues that the trial court erred in refusing to allow him to recall the victim as a witness during defendant's case-in-chief. We disagree. The victim was the prosecutor's initial witness on the first day of trial. At the conclusion of the victim's testimony, defense counsel specifically requested that the victim not be excused from the subpoena and be subject to being recalled. But at the conclusion of the trial on the second day, defense counsel put on the record that the trial court, off the record at the beginning of the second day of trial, had ruled that defense counsel could not recall the victim to testify during defendant's case-in-chief.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996). The only reason offered by defendant for recalling the victim was that he wished to question her regarding her diary and to create a foundation for admission of the diary. But defendant presents no reason why he could not have achieved this during his cross-examination of the victim during the prosecutor's case-

in-chief. Defendant did briefly touch on the diary issue during cross-examination, but did not delve into it in any significant manner. There is no indication, however, that the trial court limited the extent to which defendant could have questioned the witness during cross-examination regarding the diary. In other words, to the extent that the diary provided a basis to impeach the victim's credibility, defendant had a full opportunity during cross-examination to explore that information.

Moreover, defendant has not demonstrated how the diary would have helped his case. The issue was raised at defendant's motion for new trial and the diary was admitted into the record for the purposes of reviewing this issue. While there are some references in the diary to defendant having molested the victim, we fail to see anything in the diary which would have been helpful to defendant. And, perhaps more importantly, defendant does not point to a single entry in the diary which he purports would have been useful to the defense if the jury had been able to see it. In fact, at the motion for new trial appellate defense counsel stated that "I could not find anything in that excerpt [from the diary] which would've added to the trial, at least from what I've seen." Counsel then goes on to say that he wished to expand the record to see what trial counsel intended to do with the diary. In short, defendant fails to supply any reason why the trial court should have allowed the witness to be recalled or how defendant's defense was impaired by the refusal to do so.¹

Finally, the case primarily relied upon by defendant, *People v Burwick*, 450 Mich 281; 537 NW2d 813 (1995), is not on point. In *Burwick*, the Court concluded that the prosecutor should have been permitted the late endorsement of a witness. The Court noted that there was not cognizable prejudice to the defendant in allowing the endorsement and the failure to do so would impede the truth-determining function of the trial process. *Id.* at 297. The case at bar, however, does not involve the question whether a witness should have been permitted to testify at all. Here, the witness did testify and the defendant did have the opportunity to fully question her. Therefore, the truth-determining function was not thwarted.

In sum, defendant points to no valid reason why the victim needed to be recalled. He does not show that he was in any way limited in his ability to cross-examine her when she was on the witness stand, nor does defendant show that evidence came to light from the witnesses that followed the victim for which defendant needed the victim back on the stand to further explore. Rather, we are left with looking to a diary which does not appear to be helpful to the defense in the first place and which, in any event, could have been explored during cross-examination. Perhaps defendant thought that there would be a "surprise" in the testimony which he could spring on the prosecutor after the prosecutor had rested. While the criminal trial process does permit a certain amount of "trial by ambush," that is not a strategy that we will officially endorse, especially when it would involve multiple trips to the witness stand by a young witness in a CSC case.

¹ The prosecutor also argues on appeal that the diary would have been inadmissible under the hearsay rule. We need not address that argument in this appeal.

For the above reasons, we are not persuaded that the trial court abused its discretion in refusing to allow the victim to be recalled as a witness.

Defendant's other issue on appeal is that the trial court imposed a sentence which exceeded the sentencing guidelines without adequately articulating reasons to justify the departure. We agree. The sentencing guidelines in this case recommended a minimum sentence in the range of 43 to 107 months. The sentencing judge imposed a minimum sentence of 120 months. When defense counsel at sentencing inquired as to the reasons for the departure, the sentencing judge responded as follows:

I articulate on the record of the Defendant in this case. Certainly I've considered arguments of the prosecutor, which he is entitled to make that argument before the Court. And I have also - - it's not an argument - - but I have considered the sincere statements made by the child's adoptive father in arriving at that sentence. I trust that will satisfy the appeals court.

It does not.

The trial court additionally filed a departure form in this case with the following statement:

THE COURT EXCEEDED THE GUIDELINE RANGE FOR THE FOLLOWING REASONS: THE YOUNG AGE OF THE VICTIM AND THE AGES OF PRIOR VICTIMS, THE PSYCHOLOGICAL PROBLEMS OF THE LATEST VICTIM AND THE DENIAL BY THE DEFENDANT OF ANY WRONGDOING.

At the hearing on defendant's motion for new trial and resentencing, which was conducted by a different judge, the trial court agreed with defendant that the sentencing judge improperly considered defendant's denial of guilt as a reason for departure. But the hearing judge concluded that the other reasons supplied by the sentencing judge were adequate to justify the departure. We disagree.

A trial court must sentence within the guidelines range unless there exists a substantial and compelling reason for a departure. *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A substantial and compelling reason must be objective and verifiable, which must keenly or irresistibly grab our attention and be of considerable worth in determining the length of a sentence. *Id.* Substantial and compelling reasons to depart from the guidelines only exist in exceptional cases. *Id.* at 257-258. In reviewing the sentencing court's decision, the existence of a particular sentencing factor is a factual determination reviewed for clear error, while the determination that a particular factor is objective and verifiable is reviewed as a matter of law, and the trial court's determination that the objective and verifiable factors in a particular case constitute substantial and compelling reasons to depart is reviewed for an abuse of discretion. *Id.* at 273-274.

In looking to the trial court's comments at sentencing, exactly which arguments or comments by the prosecutor or the victim's father were considered by the trial court are not identified, much less whether those comments provide a substantial and compelling reason

which is objective and verifiable to justify a departure. Accordingly, there was no basis provided in the trial court's articulation at sentencing to justify the departure. Turning to the reasons listed on the departure form, we shall assume that either listing reasons on the form or restating reasons at the hearing on the motion for resentencing satisfies the requirement that reasons for departure be articulated on the record as required under *Babcock, supra* at 272. In any event, we are not satisfied that those reasons provide adequate justification for the departure.

With respect to the age of the victim in this case, she was twelve years old at the time of the offenses, a few months shy of her thirteenth birthday. Defendant was charged with having sexual contact with a person under thirteen, thus the victim was actually at the top end of the age range covered by the statute under which defendant was convicted. Had the offenses occurred a few months later, defendant presumably would only have been charged with CSC-4, a victim thirteen to fifteen years of age. Moreover, defendant was assessed ten points under OV10 for exploitation of the victim's youth and the trial court does not explain how the guidelines did not adequately consider this factor. Thus, the victim's age was fully accounted for in defendant's conviction and the sentencing guidelines.

As for the age of the victims in defendant's prior offenses, it is unclear to us how the trial court established that factor. At sentencing, the prosecutor stated that defendant's prior convictions for indecent exposure involved twelve-year-old and thirteen-year-old victims, and his prior CSC-2 convictions involved a fourteen-year-old victim. Further, the presentence investigation report refers to the victim in the prior CSC case as being a minor. At best it can be said that defendant did not object on the basis that the information was inaccurate. Assuming this information to be correct, this certainly presents a disturbing pattern of behavior by defendant. But it is behavior that is, at least to a certain degree, already considered by the guidelines. Moreover, because the sentencing judge merely noted this on the departure form rather than articulate his analysis on the record at sentencing, we are left to guess why the sentencing judge did not believe that the guidelines adequately considered the prior victims' ages and the extent to which the judge considered this factor in deciding to depart from the guidelines. That is, even if we were to accept this as a substantial and compelling reason for departure, we cannot say that the judge would have departed to the same extent in the absence of the impermissible factors discussed above. See *Babcock, supra* at 260.

With respect to the comment on the departure form regarding the psychological problems of the victim in this case, the trial court again left it to this Court to divine the extent to which the factor is present and the extent to which the trial court considered the factor in fashioning the sentence. The presentence investigation report makes a brief reference to the victim suffering "some emotional injury" and that she indicated that she would be seeking counseling for "emotional trauma." The victim's father's statement at sentencing confirmed that she was in counseling and still had a great deal of anger arising out of this offense. But the trial court fails to explain how the guidelines fail to adequately consider this factor. Defendant was assessed ten points under OV4, which is appropriate where there is a serious psychological injury requiring professional treatment. While the information supplied at sentencing may support this scoring of the guidelines, it does not provide a basis for concluding that that scoring was inadequate in this case to fully account for the victim's emotional suffering.

In sum, the trial court in this case had not established that this is the exceptional case in which there are substantial and compelling reasons to justify a departure from the sentencing

guidelines. Accordingly, we remand the matter to the trial court for resentencing. At resentencing, the trial court shall either impose a sentence within the recommended range of the sentencing guidelines or, if it imposes a sentence outside of the recommended range, it shall articulate on the record a substantial and compelling reason for the departure, which is objective and verifiable, and the trial court shall explain why that reason is not adequately considered in the guidelines' recommendation. *Babcock, supra* at 272.

Defendant's conviction is affirmed, but the matter is remanded to the trial court for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald